

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER W. HALE)	
Claimant)	
)	
VS.)	Docket No. 267,982
)	
IBP, INC.)	
Self-Insured Respondent)	

ORDER

Respondent requested review of the July 2, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 20, 2004.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It is undisputed the claimant suffered a work-related injury on July 21, 2000, when he was struck from behind by an overhead crane. Claimant was knocked to the floor and pinned beneath the crane. Following treatment, which ultimately resulted in bilateral arthroscopic knee surgeries, the claimant returned to work for the respondent. Consequently, the disputed issues for determination by the Administrative Law Judge (ALJ) were the nature and extent of claimant's functional impairment, if any, as well as claimant's entitlement to future and unauthorized medical treatment.

The ALJ adopted Dr. Lynn A. Curtis' opinion and determined the claimant suffered a 27 percent permanent partial functional impairment to the whole body. The ALJ also awarded claimant future medical treatment upon application and unauthorized medical

treatment subject to the statutory limit. Finally, the ALJ specifically appointed Dr. Tim Duncan to prescribe pain medication to relieve claimant from the effects of the work-related injury.

The respondent requests review of the nature and extent of claimant's disability as well as whether the ALJ erred in appointing Dr. Duncan to provide claimant with ongoing prescription medication. Respondent argues that the treating physician, Dr. Jeffrey T. MacMillan and the court ordered neutral health care provider, Dr. Sergio Delgado, agree that claimant's accident did not aggravate or accelerate claimant's preexisting degenerative arthritis in his knees. Consequently, respondent argues claimant should be limited to a 2 percent whole person functional impairment. Respondent concludes the appointment of Dr. Duncan should be reversed because the prescription pain medication is for claimant's preexisting degenerative arthritic condition which was not aggravated or accelerated by the work-related accident.

Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was an overhead crane operator for respondent. The crane was suspended from the ceiling on a rail and there were six other cranes operating in the area where claimant worked. On July 21, 2000, claimant's crane malfunctioned and he left it to call maintenance. As claimant was talking to an individual up on a catwalk he was hit from behind by one of the other cranes.

Claimant was knocked face down on the floor. His legs and feet were pinned underneath the crane and he was being pushed along the floor until the crane was stopped. Claimant was unable to extricate himself from under the crane and he asked the operator to reverse the crane. Claimant was then dragged backwards until he was released.

For several minutes claimant lay on the floor because he was unable to get up. Two co-workers finally assisted claimant to his feet and he was taken to the plant dispensary. The nurses provided ice treatment primarily for his ankles and feet. Claimant went home and did not miss any work, but within a few days he began to experience knee pain.

Respondent referred claimant to Dr. Joseph R. Hutchison and claimant was provided conservative treatment. Diagnostic studies including x-rays, a bone scan and an MRI of the right knee were performed. Respondent then referred claimant to Dr. Jeffrey T. MacMillan for further treatment.

Dr. MacMillan first examined claimant on September 28, 2000. Claimant was complaining of right knee pain. The doctor was provided the films of the bone scan and MRI of the right knee. The doctor noted the bone scan showed increased uptake in the medial compartment which was consistent with arthritic or degenerative change. The MRI revealed a large fluid collection within the knee joint as well as significant joint space narrowing in the medial half of the knee joint. There were also degenerative changes of the articular surface of the patellofemoral joint.

Dr. MacMillan's initial diagnosis was degenerative joint disease of the right knee with a large joint effusion or fluid collection. The doctor recommended that the appropriate treatment would be to arthroscope the knee joint in order to wash out the wear debris and particles, drain the fluid and trim any torn or frayed cartilage. This procedure was performed on October 18, 2000. During the surgery a meniscal tear, which wasn't evident on the diagnostic tests, was discovered and repaired. After surgery the claimant continued to complain of right knee pain which the doctor opined would be expected given the level of degeneration found in the right knee.

On November 30, 2000, claimant complained to Dr. MacMillan of left knee pain. Dr. MacMillan diagnosed prepatellar bursitis as well as significant lower extremity edema. Conservative treatment consisting of anti-inflammatory medications was provided. On July 16, 2001, Dr. MacMillan performed an arthroscopic debridement of claimant's left knee. During that procedure the doctor noted a degenerative left meniscal tear. On September 18, 2001, the doctor concluded claimant had reached maximum medical improvement and his final diagnosis was that claimant suffered moderately severe bilateral degenerative joint disease.

In a letter to respondent dated September 18, 2001, Dr. MacMillan rated each one of claimant's knees with a 20 percent impairment. The doctor converted the lower extremity ratings to an 8 percent whole body impairment for each knee. However, the doctor apportioned the whole body impairments and opined that 7 percent was attributable to preexisting degenerative disease. Consequently, the doctor concluded claimant suffered a 1 percent permanent partial functional whole body impairment attributable to the bilateral knee injuries claimant suffered on July 21, 2000.

Claimant testified that before the accident he had never received treatment for his knees or ankles. Claimant noted that his knees are now constantly painful and stiff. He further noted that his feet and ankles are painful, his ankles swell and he has numbness in his left foot and toes. Claimant states that he cannot walk for a very long distance before he begins to experience pain in his feet, knees, hip and back. Lastly, claimant states that he walks with a limp and that he did not suffer from any of these problems before the accident. In fact, the claimant had just completed ten years of perfect attendance before he was injured.

Although claimant had not sought further treatment since his release from Dr. MacMillan, he had gone to the plant nurse every couple of weeks with complaints. However, since he had been released from authorized treatment he was told if he needed to get his prescriptions filled he would have to find another doctor.

At his attorney's request, the claimant was examined by Dr. Lynn A. Curtis on November 8, 2001, for an assessment and an impairment rating. The claimant complained of bilateral knee pain as well as hip pain. The doctor's physical examination of claimant revealed: (1) muscle atrophy on the left lower extremity; (2) vascular discoloration on the fourth and fifth toes on the left; (3) an antalgic gait described as stiff legged with a tendency to not flex his knees; (4) loss of range of motion in both knees; (5) moderate crepitus on the right patella and mild crepitus on the left patella; (6) decreased sensation on the last three digits of the left foot; and, (7) limitation of hip flexion on the left hip and loss of internal rotation of the right hip.

Dr. Curtis opined claimant suffered a 38 percent permanent partial functional impairment to the left lower extremity and a 36 percent permanent partial functional impairment to the right lower extremity. The doctor converted and combined these ratings to a 27 percent permanent partial functional impairment to the whole body.

Dr. Curtis agreed that a bone scan would reveal whether or not there has been recent blunt trauma to a bone. And he further agreed that claimant's right knee bone scan taken September 11, 2000, did not reveal any such recent trauma to the bone and instead confirmed degenerative changes in the knee.

Dr. Curtis sent a supplemental letter to claimant's attorney on November 16, 2001 recommending claimant receive additional care for his hip pain. The doctor agreed that he took claimant's word that the hip pain was related to the accident even though there were no complaints of hip pain during claimant's medical treatment.

On April 2, 2002, the ALJ ordered Dr. Sergio Delgado to conduct an independent medical examination of claimant and render an opinion whether claimant needed additional medical treatment for the work-related injury. Dr. Delgado conducted the examination on May 7, 2002. The doctor reported that claimant should consider a left knee total replacement and the right knee should be conservatively treated with cortisone injections, use of a knee support and modification of activities. But the doctor noted that total knee replacements in both knees might be necessary. The doctor opined the claimant's back complaints would resolve upon treatment of both knees which would result in a more normal gait and stance although the doctor noted the back complaints might be related to degenerative disk disease.

Dr. Delgado's deposition was taken and he testified that after examining the claimant and reviewing the diagnostic studies it was his opinion that claimant may have suffered meniscal tears in his knees as a result of the July 21, 2000 accident. Dr. Delgado

further opined that claimant's conditions, which prompted his treatment recommendations, were the preexisting degenerative arthritic changes. Stated another way, the doctor did not believe the need for the future medical treatment he recommended was caused by the July 21, 2000 accident.

Dr. Delgado rated each of claimant's lower extremities and converted those ratings to a 1 percent permanent partial whole body functional impairment based upon the partial meniscectomies. The doctor noted that these ratings would combine for a 2 percent permanent partial functional whole body impairment. The doctor acknowledged claimant would have further impairment because of the degenerative changes in his knees but did not rate that condition because of his opinion that such preexisting condition was not related to the accident of July 21, 2000.

Although the doctor was aware that claimant gave a history of no prior problems before the accident he stated that he did not necessarily believe the claimant. Based upon his review of the medical records, diagnostic testing and his experience, Dr. Delgado concluded claimant could not have been asymptomatic. The doctor did not believe the accident aggravated or accelerated claimant's preexisting degenerative arthritis. Dr. Delgado based his opinion upon the fact that the bone scan showed generalized rather than localized hot spots.

Dr. MacMillan testified that the July 21, 2000 accident neither aggravated, accelerated or exacerbated the underlying degenerative condition in either of claimant's knees. Moreover, the doctor testified that his recommendation that claimant take anti-inflammatory medication and use Neoprene knee sleeves was not related to the injuries claimant suffered July 21, 2000. Lastly, Dr. MacMillan modified the rating he had provided in his letter dated September 18, 2001, and concluded that the left knee meniscus was clearly a degenerative tear and not related to the accident.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.¹ A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."² The phrase "arising out of" employment requires some causal connection between the injury and the employment.³ The existence, nature and extent of the disability of an injured workman is a question of fact.⁴ A workers

¹ K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App.2d 277, 826 P.2d 520 (1991).

² K.S.A. 44-501(a).

³ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁴ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.⁵ The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.⁶

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁷ Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁸

As previously noted, work disability is not an issue in this case because respondent returned claimant to work after his surgery earning 90 percent or more of his pre-injury average weekly wage. Accordingly, claimant's entitlement to permanent partial disability benefits is based on claimant's permanent functional impairment as established by competent medical evidence and based on the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁹

Drs. Delgado, MacMillan and Curtis expressed opinions on claimant's permanent functional impairment. The doctors utilized the *AMA Guides* in determining claimant's functional impairment rating. Drs. Delgado and MacMillan concluded claimant suffered a 2 percent permanent partial whole body functional impairment. The ALJ adopted Dr. Curtis' 27 percent impairment rating.

The primary disagreement is whether claimant's accidental injury on July 21, 2000, aggravated, accelerated or intensified claimant's preexisting degenerative arthritis in his knees.

It is clear that claimant had a preexisting condition in his knees before the July 21, 2000 accident. All three doctors noted that claimant has severe degenerative arthritic changes in both knees. Those degenerative arthritic changes are the primary reason that claimant will likely need total knee replacements. But claimant's testimony established that

⁵ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184 (2000) *rev. denied* 270 Kan. 898 (2001).

⁶ *Carter v. Koch Engineering*, 12 Kan. App.2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

⁸ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁹ K.S.A. 44-510e(a).

before the injury at work on July 21, 2000, he had no limitations due to the underlying arthritic condition in his knees. Since the work-related accident the claimant has continuing pain and stiffness in his knees and walks with a limp. The claimant's testimony establishes that the work accident made the underlying degenerative arthritic condition in his knees symptomatic. The Board concludes claimant has met his burden of proof that his work-related accident aggravated and intensified the preexisting degenerative arthritis in his knees.

The Board is not unmindful that Drs. MacMillan and Delgado opined that the accident had not accelerated, aggravated or intensified claimant's degenerative arthritis in his knees. However, the claimant described an onset of pain in his knees and Dr. MacMillan performed arthroscopic surgery on both knees. Clearly the claimant's knees were symptomatic or the surgeries would not have been necessary. And claimant's uncontradicted testimony established he had never had medical treatment for his knees before the accident. Simply stated, claimant's testimony that his knees are now symptomatic is supported by the evidentiary record and is sufficient to meet his burden that the accident aggravated the preexisting degenerative arthritis in both of his knees.¹⁰

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**¹¹ (Emphasis added).

Consequently, the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the *AMA Guides*¹², if the impairment is contained in those *Guides*. Moreover, the Act requires that the amount of the functional impairment be established by competent medical evidence.

On the other hand, the Act does not require that the preexisting functional impairment be evaluated and a rating provided before the later work-related accident. Nor does the Act require that the worker be given work restrictions for the preexisting condition

¹⁰ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184 (2000) *rev. denied* 270 Kan. 898 (2001).

¹¹ K.S.A. 44-501(c) (Furse 2000).

¹² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

before the later work-related accident. Nonetheless, the Act does require that the preexisting condition actually constitutes a functional impairment.

When Dr. MacMillan determined claimant had reached maximum medical improvement on September 18, 2001, he opined claimant had a 20 percent permanent partial functional impairment to each lower extremity. The doctor converted the ratings to an 8 percent whole person impairment for each of the lower extremities. In this case the doctor quantified the percentage of disability that was preexisting. Dr. MacMillan specifically determined that 7 percent for each extremity was preexisting and accordingly concluded that claimant had suffered a 1 percent whole person impairment for each of the lower extremities. These combine for a 2 percent whole person impairment.

Dr. Delgado, the court-ordered independent medical examiner, also concluded claimant suffered a 2 percent whole person impairment as a result of his work-related injuries but did not rate claimant's preexisting impairment. The Board finds Drs. MacMillan and Delgado's ratings more persuasive than Dr. Curtis' rating and, accordingly, the Board finds claimant suffered a 2 percent whole person impairment as a result of the July 21, 2000 accident. Consequently, the ALJ's Award is modified to find claimant suffered a 2 percent whole person impairment as a result of his July 21, 2000 work-related accident.

It was undisputed that prescription medication was recommended for claimant's ongoing complaints attributable to the degenerative conditions in his knees. The respondent objected to the ALJ's award that such prescription medication be provided on an ongoing basis but only because of its contention the claimant's preexisting degenerative condition was not aggravated, accelerated or intensified by the accident. The Board's determination that the accident did aggravate claimant's preexisting degenerative arthritis in his knees renders respondent's objection moot. Consequently, the Board affirms the ALJ's Award of ongoing prescription medication as well as future medical upon proper application.

Accordingly, the ALJ's Award is modified to reflect claimant suffered a 2 percent permanent partial whole body functional impairment and affirmed in all other respects.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 2, 2003, is modified to reflect claimant suffered a 2 percent permanent partial whole body functional impairment and affirmed in all other respects.

The claimant is entitled to 6 weeks of temporary total disability compensation at the rate of \$321.76 per week or \$1,930.56 followed by 8.3 weeks of permanent partial disability compensation at the rate of \$321.76 per week or \$2,670.61 for a 2 percent functional

impairment, making a total award of \$4,601.17, which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director